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No. 972

In the Supreme Court of the United States

October Term, 1961

FIRST LIEUTENANT GEORGE EDWARD LEONARD,
Army of the United States, F. S. A. F., retired, *Plaintiff*,

vs.

THE UNITED STATES, *Defendant*.

SECOND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

GEORGE EDWARD LEONARD,
Plaintiff,
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Kansas City 6, Missouri.

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SMITH-GRIEVES LAW PRINTERS KANSAS CITY, MO

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In the Supreme Court of the United States

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Army of the United States, U. S. A. F., retired, *Plaintiff*,

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THE UNITED STATES, *Defendant*.

SECOND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. .....

Order and Judgment Sought to Be Reviewed.

May it please the Court:

A. The new order of the United States Court of Claims dated January 12, 1962, overruling motion to reopen and for relief from judgment, entered without opinion.

B. The old judgment of the United States Court of Claims, dated November 7, 1956, rehearing denied January 16, 1957, entered on an opinion reported in 136 Ct. Cl. 186, 145 F. Supp. 758, C. D. 353 U. S. 976, expressly overruled in *Watman* v. *U. S.*, ... Ct. Cl. ....., 288 F. 2d 472, decided March 1, 1961.

First Lieutenant George Edward Leonard, Retired, of Kansas City, Missouri, prays that a writ of certiorari issue to review the order of the United States Court of Claims overruling plaintiff's motion to reopen and motion for relief from judgment and to review the judgment conceded by the Court of Claims in its opinion in Watman, overruling Leonard, to have been rendered without having before it the necessary legal and factual materials. This judgment was sought to be reviewed in the first petition for certiorari, No. 908, October term, 1956.

Opinions Below.

The order overruling plaintiff's motion to reopen and motion for relief from judgment was without opinion.

The judgment was entered on an opinion reported in 136 Ct. Cl. 686, 145 F. Supp. 758, cert. den. 353 U. S. 976, expressly overruled in the companion case, *Watman* v. *United States*, ... Ct. Cl. ....., 288 F. 2d 472.

Jurisdiction.

The date of the order denying plaintiff's motion to reopen and for relief from judgment of the Court of Claims and time of entry was January 12, 1962.

The jurisdiction of this Court to review by writ of certiorari is conferred by 28 U. S. C. A., Sec. 1255, 62 Stat. 928.

Statement of Debt of U. S.

HEADQUARTERS
AIR FORCE ACCOUNTING AND FINANCE CENTER
UNITED STATES AIR FORCE
DENVER, COLORADO

20 Sep 1961

ARRA
Retired Pay—LEONARD, George E. Jr.
AO 91 4948

1st Lt George E. Leonard Jr., USAF (Ret.)
921 Walnut Street
Kansas City, Missouri

1. Your letter of 18 August 1961, requesting amounts of retired pay withheld during periods of Federal Employment from 30 June 1950 through 31 December 1954, has been referred to us for reply.

2. The following retired pay was issued to you:

Period	Monthly Rate	Amount Paid
13 Jan 52—30 Apr 52	$150.00	$ 540.00
1 May 52—1 Sep 52	$156.00	$ 629.20
18 Jun 53—31 Dec 54	$156.00	$2875.60
	Total retired pay issued	$3044.80

3. The amounts of retired pay withheld during periods of Federal Employment are as follows:

Period	Monthly Rate	Amount Withheld
1 Jul 50—12 Jan 52	$150.00	$2760.00
2 Sep 52—17 Jun 53	$156.00	$1487.20
	Total amount withheld	$4247.20

FOR THE COMMANDER
L. A. CLARK
Director of Allotments
and Retired Pay

Questions Presented for Review.

1. Did the Court of Claims err in refusing to reopen its summary judgment, when it became manifest, in a companion case, that it had been rendered for the wrong party, particularly in view of the fact the unjust judgment had been procured by erroneous representations of the United States that there were no disputable material facts?

2. Is the summary judgment of the Court of Claims void for want of due process and reviewable by the Court of Claims on motion, where plaintiff was denied the opportunity consistently requested, to prove his case, after the court, in a companion case, in effect acknowledges the validity of plaintiff's claim?

3. Must an unconscionable summary judgment of the Court of Claims bar the United States from paying its admitted debt to plaintiff?

Statute Involved.

The Act of June 25, 1948, c. 646, 62 Stat. 940, 28 U. S. C. A., Sec. 1491, Claims against the United States, generally provides:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
>
> (1) Founded upon the Constitution; or
>
> (2) Founded upon any Act of Congress; or
>
> (3) Founded upon any regulation of an executive department; or
>
> (4) Founded upon any express or implied contract with the United States; or
>
> (5) For liquidated or unliquidated damages in cases not sounding in tort."

STATEMENT.

On May 25, 1955, plaintiff instituted suit in the Court of Claims to recover retired military disability pay which had been awarded him but withheld during periods he was employed by the United States in various civilian capacities.

On February 15, 1956, defendant filed motion for summary judgment, stating that the question presented was "Whether one who is not now and has never been a member of any Officers' Reserve Component but who is entitled to military disability pay may receive both disability pay and government civilian salary in excess of the amount provided by the Economy Act of 1932 (5 U. S. C. A. 59a)."

On August 31, 1956, plaintiff filed response to motion for summary judgment, asserting that the motion should be denied as it "assumes without adequate supporting exhibits the most substantial factual issue in the case, namely that plaintiff is not now and has never been a member of any Reserve Component of the Army or Air Force of the United States. Plaintiff in his printed and oral argument urged upon the Court of Claims the existence of "genuine issues of material facts" and that "this case cannot be ruled on motion for summary judgment."

On November 7, 1956, the Court of Claims entered summary judgment dismissing plaintiff's petition.

Plaintiff, in his motion for rehearing, argued that the court, in holding the essential facts indisputable, overlooked the fact that the record before it was an ex parte record and that the plaintiff did earnestly and in good faith dispute the finding that plaintiff was a civilian.

Plaintiff's petition for rehearing was denied January 16, 1957.

Certiorari was denied May 27, 1957, by the Supreme Court.

On March 1, 1961, the Court of Claims entered summary judgment allowing plaintiff Watman retired disability pay withheld while he was employed by the United States even though his status was the same as plaintiff Leonard. To reach this result, the court expressly overruled the Leonard case with this explanation of its change of position. "In justification of our overruling of our previous decisions it is only fair to ourselves to say that we have never, before considering this case, had before us all of the legal and factual materials necessary to the solution of these difficult problems."

On July 3, 1961, the Comptroller General refused to pay plaintiff Leonard because of the judgment of the Court of Claims in Leonard.

On July 6, 1961, the Comptroller General paid 1st Lt. Howard J. Hess, retired, with the same status as Leonard, retired disability pay withheld while he was employed by the United States.

On July 12, 1961, the Court of Claims set aside its judgment entered January 20, 1960, denying Palmer, with the same status as Leonard, retired disability pay.

On September 20, 1961, plaintiff Leonard filed his motion to reopen and motion for relief from the summary judgment denying him retired disability pay upon five grounds:

I.

Opinion upon which judgment entered expressly overruled.

This Court, having in *Watman* v. *United States*, Ct. Cl. No. 189-59, decided March 1, 1961, expressly overruled *Leonard* v. *U. S.* in the interest of justice should vacate its void judgment based on the overruled opinion. Thus the liability of the government to plaintiff has been judicially recognized.

II.

Judgment entered without due process of law.

The judgment herein was summary, without trial of the issuable facts, and was void and should be vacated because it deprived plaintiff of his day in court to prove his claim in violation of the Fifth Amendment to the Constitution of the United States providing that no person shall be deprived of property without due process of law.

III.

Judgement founded on a false issue.

Plaintiff is a retired member of the Officer's Reserve Corps of the United States Air Force and as such is entitled to retired disability pay which is being wrongfully withheld because of the judgment herein partly based upon the misconception that plaintiff is a civilian. This misconception of plaintiff's status seems to have resulted from statements of counsel for the United States, in a motion for summary judgment and at the oral argument. As recent evidence of plaintiff's status, we set out Paragraph 4 of Air Force Order, dated April 28, 1960.

IV.

Judgment results in United States Holding funds belonging to plaintiff as trustee *de son tort*.

The United States has accepted the decision in Watman and is paying dual compensation claims (suspended after Leonard) and is withholding payment of Leonard's claim on the basis that the judgment in *Leonard* v. *U. S.* has not been vacated.

V.

Judgment is contrary to equity and good conscience.

The judgment herein is inequitable and unjust as it is based on both factual and legal mistakes recognized to have been made, as set out in *Walman* v. *U. S.*, filed March 1, 1961.

On January 12, 1962, the Court of Claims without opinion overruled plaintiff's motion for relief from judgment.

Jurisdiction of the Court of Claims.

The basis for Federal jurisdiction in the Court of Claims is that petitioner's claim is for disability retired military pay granted under the Act of April 3, 1939, 53 Stat. 557. The Court of Claims is given jurisdiction to determine claims against the United States arising under Acts of Congress. 28 U. S. C. A., Sec. 1491, 62 Stat. 940.

Reasons for Allowing the Writ.

1. Great importance of establishing guide for lower courts as to the measure of control they should exercise over the entry and reopening of summary judgments, based on affidavits and statements of counsel, rather than on adversary trials based on evidence.

2. Great importance of establishing standard of due process as applied to summary judgments and determination of factual issues.

3. Great importance of establishing judicial criteria for the relaxation of the rule of finality of judgments of lower courts when the interests of justice make unfair its application.

4. The judgment of the Court of Claims, until set aside, results in the United States continuing to hold funds belonging to petitioner as trustee *de son tort*.

5. The judgment herein is inequitable and unjust as it is based on both factual and legal mistakes recognized to have been made, as set out in *Watman* v. *U. S.*, filed March 1, 1961.

ARGUMENT.

I.

The Court of Claims erred in refusing to reopen its summary judgment denying petitioner's claim on acceptance of erroneous facts.

It seems evident that petitioner was entitled to recover upon his claim against the United States for retired military disability pay withheld from him on the erroneous theory that he was subject to the provisions of the Economy Act, *Watman* v. *U. S. Supra.* It seems evident that the United States would pay the claim were it not for the erroneous summary judgment, entered by the Court of Claims without having and without permitting petitioner to produce the material facts *Watman* v. *U. S. Supra.*

Apparently, the Court of Claims construed its rules or its jurisdiction against reopening the summary judgment because of lapse of time.

We believe this Court should grant certiorari to the Court of Claims to decide the important question of the control the Court of Claims should exercise over this summary judgment rendered for the wrong party and induced by erroneous statements of fact as to petitioner's status, made by the United States in its motion for summary judgment.

The Court of Claims, we believe, should exercise the same control of its judgments as does this Court.

In *United States* v. *Ohio Power Co.*, 1957, 353 U. S. 98, 1 L. Ed. 2d 683, 685:

> "We have consistently ruled that the interest in finality of litigation must yield when the interests of justice would make unfair the strict application of our rules. This policy finds expression in the manner in which we have exercised our power over our own judgments, both in civil and criminal cases." (Citing cases.)

This Court in many cases and in a variety of situations has consistently ruled that litigants be granted the opportunity of hearing and trial to develop the facts, as a fundamental ingredient of due process. See:

Machibroda v. *United States*, 1962, 7 L. Ed. 2d 473, 478, holding that the sentencing court erred in making findings on controverted issues of fact without a hearing.

Walker v. *Johnston*, 1940, 312 U. S. 275, 85 L. Ed. 830, 836, holding in a habeas corpus case that pleadings, affidavits, and denials only serve to make the issues which must be resolved by evidence taken in the usual way.

Saunders v. *Shaw*, 1916, 244 U. S. 317, 61 L. Ed. 1163, injunction case, holding the decree of the Supreme Court of Louisiana, rendered without a trial upon the issue of fact in the trial court, violated due process.

II.

The Court of Claims, in denying petitioner's motion to reopen and to grant relief from its summary judgment, denies petitioner collection of a now conceded obligation from the United States and leaves both petitioner and the United States helpless to right a clear injustice.

The United States declines payment because of 28 U. S. C. A., Sec. 2519, 62 Stat. 979, providing: "A final judgment of the Court of Claims against any plaintiff shall forever bar any further claim, suit or demand against the United States arising out of the matters involved in the case or controversy." It continues to hold money belonging to petitioner, as a trustee *de son tort*.

Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation. Sec. 19, Art. II, Constitution of Illinois, 1870.

Conclusion.

We believe the Supreme Court should grant certiorari and determine whether the Court of Claims can and should relieve the parties from such an unconscionable, unfair, and unjust result as the Court of Claims itself recognized, when it repudiated the Leonard case in *Watman* v. *United States*, but has failed to correct the injustice and make an order for payment.

Respectfully submitted,

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